

3  
FL Bar  
Foundation et

O/a 11-7-88

FILED  
SD FLA

IN THE SUPREME COURT OF FLORIDA

OCT 10 1988

MATTER OF INTEREST ON  
TRUST ACCOUNTS: A PETITION  
TO AMEND THE RULES REGULATING  
THE FLORIDA BAR,

CLERK OF THE SUPREME COURT  
By \_\_\_\_\_ Deputy Clerk

Case No. 72,671

C  
ph

COMMENTS OF THE FLORIDA BAR IN RESPONSE TO PETITION OF  
THE FLORIDA BAR FOUNDATION FOR MODIFICATION OF  
THE INTEREST ON TRUST ACCOUNTS PROGRAM

THE FLORIDA BAR ("the Bar") hereby files these comments in response to the petition of The Florida Bar Foundation ("the Foundation") for modification of the interest on trust accounts ("IOTA") program and respectively states:

1. On July 16, 1981 the Supreme Court of Florida, in its historic opinion of Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981) finally shaped this country's initial effort at embracing the model British and Canadian programs which allow attorneys to deposit short-term or small client trust funds into pooled interest-bearing accounts so that the interest on these monies may be channeled into a charitable foundation for the ultimate use in law-related public interest programs.

2. That arduous yet successful undertaking, reflecting the joint labors of many imaginative Florida lawyers and financial leaders--and certainly this Court--is well chronicled in the archives of this state's legal profession and still heralded throughout the organized bar of America.

3. One major aspect in the final implementation of that program was this Court's consideration of whether it be a voluntary or a mandatory plan. After careful review of at least 13 significant legal and practical objections raised by the rank and file members of this bar and Florida's financial community, this Court reaffirmed its initial intention that Florida's IOTA program

be offered "only on a voluntary basis--that is, on the basis of willing participation by attorneys and law firms whether proprietorships, partnerships or professional corporations." 402 So.2d 389 at 393-4

4. Notwithstanding this Court's expression that its 1981 finishes upon this purely voluntary program were its "last endeavor in this field" [402 So.2d at 393] more than 50 active members of The Florida Bar, on behalf of The Florida Bar Foundation, have now filed a petition in this Court requesting an order amending Rule 5-1.1(d) of the Rules Regulating The Florida Bar. The petition seeks amendment of the present interest on trust accounts program, to convert it from voluntary to comprehensive in its operation. Among other changes, such modification would require that all trust funds earn interest either for the benefit of clients or, where impracticable or too burdensome to the attorney, the IOTA program.

5. As a result of Petitioners' formal notice of their filing and this Court's request for additional public comment--both reported in The Florida Bar News--a number of Bar members and other entities have registered various observations regarding this proposal prior to the Court's September 1, 1988 deadline.

6. This Court allowed The Florida Bar until October 7, 1988 to file its comments regarding the pending petition. Said enlargement of time was premised in part on the Bar's desire to have its Special Committee To Study Comprehensive IOTA conduct a thorough review and evaluation of the comprehensive interest on trust accounts proposal as a prelude to a final vote on this issue at the September 29-30, 1988 session of the Board of Governors of The Florida Bar. In the interim, Board members utilized this opportunity to poll their constituents regarding this measure while

the Bar's general membership engaged in additional debate on the IOTA concept.

7. The Florida Bar's seven-member special committee engaged in over six weeks of study, which included a public forum to receive additional commentary and to clarify concerns regarding this topic from the Bar's general membership. A majority of that special committee recommended that the Bar's Board of Governors support a mandatory IOTA program in Florida. A minority position was expressed against mandatory IOTA, further urging that the Board of Governors oppose the concept and either adopt an opt-out plan or maintain the present voluntary program. The full text of the special committee's final 14-page report is attached to this pleading (Exhibit A) for the additional edification of this Court.

8. Following a review of that report, and after nearly two hours of debate, The Florida Bar Board of Governors voted 22-19 on September 30, 1988 to respectfully recommend that this Court consider a mandatory IOTA plan with an opt-out feature in its review of the present petition to modify Florida's interest on trust accounts program.

9. Since the filing of the instant petition--and indeed since the general IOTA concept was initially considered for inauguration in this state--the topic of interest on lawyer trust accounts has generated considerable sentiment from within and beyond the membership of this organization. The issues relative to a voluntary IOTA program in Florida have been responsibly briefed, argued and addressed in past opinions of this Court.

10. The expressions of those who have formally responded to this Court's most recent request for commentary on the present proposal reflect that a wholly comprehensive IOTA program may be an

even more provocative subject, raising additional concerns as to the extent of this Court's constitutional authority and the due process rights of clients whose trust deposits are indispensable for the operation of this program.

11. The wide range of viewpoints additionally reported during the September 30 session of the Bar's Board of Governors appears consistent with the observation that a significant portion of this organization--some 66 percent according to the 1988 Annual Survey of Florida Members--disfavors any mandatory IOTA program. An advance copy of the October 15 Florida Bar News account of those Board proceedings, from publication galley sheets, is attached to these pleadings (Exhibit B) for the benefit of this Court.

12. As further reflected during the September Board deliberations, the governors of this Bar express substantial concern over the necessity for any type of mandatory IOTA program that would essentially compel an unprecedented form of political and social involvement upon a captive membership that may successfully question, on federal constitutional grounds, such an expanded scope of activities and programs of the integrated bar in this state.

13. No proposed amendments to the Rules Regulating The Florida Bar have been proffered to this Court to implement the opt-out IOTA program now recommended. Given the timing of our Board's vote and its significant variance from the Foundation's proposal, there has been no opportunity for the dialogue between both organizations that would be necessary to draft any mutually acceptable Bar rule changes for Court consideration at this time.

14. However, aspects of the proposed rules contained within the instant petition are questionable. Specifically, the comprehensive program's rigidly codified requirement that trust

accounts must earn interest for the benefit of clients in all "non-IOTA" situations--the distinctive feature of comprehensive IOTA--was viewed as potentially troublesome by Bar governors during their September 30 deliberations. Arguments already before this Court in these proceedings highlight possibilities where the comprehensive IOTA program may not make sufficient allowances for foreign clientele and other unique trustors who cannot or do not want to accommodate any interest income on trust deposits no matter what its magnitude.

15. An opt-out program has no such inflexible requirement as to disposition of "non-IOTA" trust deposits. This does not signal any diminution in Bar concern over responsible fiduciary administration, however. But a codification of that ethical obligation, already recognized by the Bar and this Court, should await refinement until another time. Further, consideration by this Court of any type of mandated IOTA program could only be aided by review of a "single subject" proposal that is free of additional issues raised by Petitioners and other commentators nevertheless in need of resolution in other proceedings.

16. Also, the Petitioners' September 12 reply in this matter interjects additional proposals for amendments to the Rules Regulating The Florida Bar which were not formally noticed per the dictates of Rule 1-12.1. A suggested new Bar Rule 5-1.1(d)(4)d seemingly would grant the Florida Bar Foundation sole authority to determine whether certain trust accounts of a marginal amount might be exempted from IOTA participation if they failed to net any interest after deductions for various service charges by financial institutions. Assuming Supreme Court of Florida action on this issue, this suggested revision of Bar rules merits careful consideration as to the propriety of any such delegation by this tribunal of its final authority to a private nongovernmental entity.

17. The Bar's support of a progressive opt-out program, devoid of comprehensive's rigid and compulsory requirements, offers a distinct opportunity for greater IOTA revenues in this state and a corresponding increase in beneficial Foundation programming. The Petitioners note that opt-out states average a 49 percent participation level among their bar members. This Bar would actively seek a similar show of support from within its own ranks if an opt-out program were implemented in Florida.

18. The Bar has not otherwise attempted to provide this Court with specific guidance on every rule change conceivable in the resolution of this matter. Yet, the diversity of commentary submitted in this action has raised many important issues that would benefit from further discussion by this tribunal. Perhaps the additional enlightenment of oral argument coupled with final guidance from this Court will assist in charting the ultimate destination for Florida's IOTA program.

19. This submission by the Bar should nevertheless identify certain aspects of the petition's proposed rule changes in need of further refinement were revisions still contemplated in the current IOTA program. And it is especially significant to note that neither the Bar's governing Board nor its special study committee evidenced any ultimate support of the comprehensive IOTA concept.

20. However, as an alternative, The Florida Bar urges this honorable Court to accept our recommendation of a mandatory opt-out IOTA program, applicable to all in-state Bar members. Such an undisputed improvement of our current program merits an opportunity for consideration in this state, and sufficient time to prove its worth. Also, the opt-out aspect reduces numerous stresses on this Court and the integrated Bar evident by the pleadings submitted in this matter.

21. The Bar's proposal signifies its continued allegiance to a premier public program of the legal profession, jointly created by this organization, and one in which every Florida attorney should take great pride. Our recommendation remains consistent with this Court's 1981 opinion which carefully crafted a purely voluntary IOTA program with attendant virtues otherwise lost in the comprehensive concept.

22. Implementation of an opt-out program could be effected by the affirmative support of this Court for such a concept, coupled with a charge to both The Florida Bar and the Florida Bar Foundation to provide for your consideration, within a date certain, all desired changes in both organizations' charter documents which might address IOTA administration, uses of charitable funds, trust account ethics and other issues raised in this action.

WHEREFORE, The Florida Bar prays this Court will enter an order adopting a mandatory interest on trust accounts program, with an opt-out feature, for all Florida-based members of this organization. Said order should specify implementation of such a program in a manner otherwise consistent with the observations noted in this pleading.

Respectfully submitted,

Rutledge R. Liles  
President  
The Florida Bar  
Post Office Box 420  
Jacksonville, Florida 32201  
(904) 632-2200

John F. Harkness, Jr.  
Executive Director  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399-2300  
(904) 222-5286

Stephen N. Zack  
President-elect  
CourtHouse Center, 26th Floor  
175 N.W. 1st Avenue  
Miami, Florida 33128  
(305) 373-4000

Paul F. Hill  
General Counsel  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399-2300  
(904) 222-5286

By:   
Paul F. Hill

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: Harvey M. Alper, 112 West Citrus Street, Altamonte Springs, Florida 32714; Associations for Retarded Citizens/Florida, c/o Brent R. Taylor, 411 East College Avenue, Tallahassee, Florida 32301; Ben L. Bryan, Jr., Post Office Box 1000, Ft. Pierce, Florida 34954; Michael H. Davidson, Post Office Box 11959, Ft. Lauderdale, Florida 33339; Florida Legal Services, Inc., c/o Steven M. Goldstein, 345 South Magnolia Drive, Tallahassee, Florida 32301; Joseph W. Little, 3731 N.W. 13th Place, Gainesville, Florida 32605; National Association of IOLTA Programs, c/o Russell E. Carlisle, 415 S.E. 12th Street, Ft. Lauderdale, Florida 33316; Richard V. Neill, Post Office Box 1270, Ft. Pierce, Florida 34954; Brian C. Sanders, Post Office Box 2529, Ft. Walton Beach, Florida 32549; Southern Legal Counsel, Inc., c/o Jodi Siegel et al, 115-A N.E. 7th Avenue, Gainesville, Florida 32601; Henry P. Trawick, Jr., Post Office Box 4019, Sarasota, Florida 34230; Williams, Parker, Harrison, Dietz & Getzen, c/o J. Michael Hartenstine, Post Office Box 3258, Sarasota, Florida 34230; by mail this 7th day of October, 1988.



Paul F. Hill

Florida Bar Attorney No. 137430